Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

URI SHEINBAUM and MARC A. BIRNBAUM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Should the fact that the defendants in a criminal case entered into a civil settlement with the victim of the alleged offense preclude the award of restitution under the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-64?

II. Has the Fifth Circuit Court of Appeals improperly extended the holding of *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) by concluding that *Kelly* allows District Courts to impose restitution orders notwithstanding civil settlements?

III. Does allowing the award of restitution notwithstanding a civil settlement constitute impermissible double recovery by a victim of an offense?

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Petitioners, Uri Sheinbaum and Marc A. Birnbaum, hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered February 27, 1998 (rehearing denied January 22, 1999) affirming the District Court's awarding of restitution pursuant to a criminal judgment nothwithstanding the fact that the defendants and the victim of the alleged criminal offense had previously entered into a civil settlement resolving all claims between them.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit affirming Petitioners' sentences and restitution orders is reported as follows:

UNITED STATES v. URI SHEINBAUM AND MARC A. BIRNBAUM,

136 F.3d 443 (5th Cir. 1998)

This Opinion may be found in Appendix A of this petition. The order of the Court of Appeals denying the Petition for Rehearing and the Suggestion for Rehearing En Banc may be found at Appendix D of this petition.

The unreported criminal judgments from the District Court ordering the restitution in this case may be found in Appendix B and C of this petition.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on February 27, 1998. Rehearing was denied on January 22, 1999.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-64. These provisions are set out in their entirety in Appendix E to this petition.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Court Below

Petitioners Uri Sheinbaum and Marc A. Birnbaum were charged in a four count indictment along with two other individuals with the offense of Conspiracy to Commit Wire Fraud, Bank Fraud and Bankruptcy Fraud. On February 20, 1997 (Sheinbaum) and February 27, 1997 (Birnbaum) Petitioners entered guilty pleas to Count One of the indictment alleging conspiracy to commit bankruptcy fraud. On August 25, 1997, Petitioners were both sentenced by the Court to seven months in the custody of the Attorney General followed by three years supervised release. Both Petitioners were ordered to pay $498,995 in restitution and a $50 special assessment and Mr. Birnbaum was ordered to pay a fine of $20,000. Timely notice of appeal was given to the Court of Appeals. The Court of Appeals had jurisdiction over the appeal based on it being an appeal from a final judgment of a District Court pursuant to 28 U.S.C. § 1291 and an appeal of sentencing issues pursuant to 18 U.S.C. § 3742.

II. Statement of Facts

Petitioners were convicted upon their pleas of guilty to the offense of conspiracy to commit bankruptcy fraud in the United States District Court for the Eastern District of Texas, Sherman Division, in cause number 4:96-CR-00035. There was no loss from the conduct for which Petitioners pled guilty. However, Petitioners were given a 9 level enhancement to their sentencing guidelines based on a $350,000 to $500,000 loss amount on a theory of relevant conduct under the sentencing guidelines.

Petitioners were charged in a four-count indictment along with two other individuals with the offense of Conspiracy to Commit Wire Fraud, Bank Fraud, and Bankruptcy Fraud in connection with a $10.2 million loan used to purchase the 5555 Apartments located at 5555 Spring Valley Road in Dallas, Texas. The indictment alleged that Sheinbaum and Birnbaum and the other co-defendants violated the terms of the loan note when they kept rental proceeds and other income amounting to approximately $500,000 from the 5555 Apartments while they let the loan, owned by Bankers Trust, default. To avoid foreclosure, the Petitioners caused the 5555 Apartments, Ltd. to file for bankruptcy protection. During the bankruptcy, the Petitioners made false statements to the bankruptcy court. Petitioners subsequently pled guilty to one count of conspiracy to commit bankruptcy fraud (Count 1 of the indictment). The specific conduct pled to did not cause any loss in this case.

Petitioners objected to the 9 level increase in their sentence based on the fact that there was no loss to Bankers Trust from the relevant conduct because Petitioners had the legal right to make the disbursements that formed the basis

for the loss. This loss amount was not included in the part of the Indictment (Count 1) that Petitioners pled guilty to. At the sentencing hearing, John Flowers, a former bankruptcy judge for the United States District Court for the Northern District of Texas, testified that the use of the rents did not violate the rights of Bankers Trust because, under Texas law, Bankers Trust had no right to control or possession of the rents at the time the payments were made. The District Court disagreed with this reasoning and sustained the loss amount and 9 level increase in Appellants' sentences. Additionally, Petitioners, in their objections filed prior to the sentencing hearing, contended that restitution was inappropriate because there was a civil settlement entered into between the alleged victim and the Petitioners resolving all claims between them. The District Court rejected this and ordered restitution payments of $498,995 be made by Petitioners.

REASONS FOR GRANTING THE WRIT

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW WITH ARGUMENT

Question I

Should the fact that the defendants in a criminal case entered into a civil settlement with the victim of the alleged offense preclude the award of restitution under the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-64.

Reasons for Granting the Writ

This question presents the very important issue of what effect a civil settlement between a defendant and a victim has on the award of restitution under the Victim and Witness

Protection Act. It is a question over which the Courts of Appeals have differed and involves an issue that arises with regularity in the District Courts during sentencing proceedings. Parties will often reach agreements to settle disputes between them and then a criminal prosecution will follow. The District Court is then faced with a decision as to whether the civil settlement precludes a restitution order or, if not, how it is to be factored into the restitution decision. Under Rule 10(a), Supreme Court Rules, the conflict between the various United States Courts of Appeals on this question provides a basis for the granting of this petition. Moreover, in this case, the United States Court of Appeals for the Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by the Supreme Court, i.e., whether the fact that the defendants in a criminal case have entered into a civil settlement with the victim of the alleged offense should preclude the award of restitution under the Victim and Witness Protection Act.

The Fifth Circuit, in the case at bar, concluded that,

> . . . District Courts possess the discretion to impose restitution orders in spite of civil settlements. That the victim has agreed in a civil proceeding that it has been compensated fully does not prevent a District Court from pursuing the rehabilitative and retributive functions of the criminal law served by restitution.

The Fifth Circuit found support for it's opinion in *United States v. Cloud*, 872 F.2d 846 (9th Cir. 1989), *cert. denied*, 493 U.S. 1002, 110 S. Ct. 561, 107 L. Ed. 2d 556 (1989). However, the Fourth Circuit, in *United States v. Bruchey*, 810 F.2d 456, 460 (4th Cir. 1987) came to an opposite conclusion. In *Bruchey*, the court stated:

> Our expressions of concern regarding the duration and form of the restitution order should not be taken to mean that a promissory note or the like should never be countenanced as "restitution". Where the victim and defendant voluntarily execute such a note, the judge can certainly factor that agreement into his sentencing decision. We must observe, however, the such a voluntarily executed agreement constitutes full and immediate restitution–fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA. The victim could simply enforce the civil obligation through the ordinary civil process.

The contrast between the Fifth and Ninth Circuits on one side and the Fourth Circuit on the other side is clear. The civil settlement entered into between the Petitioners in this case with their alleged victim would preclude the criminal restitution order in the Fourth Circuit. Based on the stark contrast between the circuits on this issue, as well as the dramatic differences this causes from circuit to circuit, this petition should be granted. *See also United States v. Parsons*, 141 F.3d 386 (1st Cir. 1998) (discussed below).

Moreover, the Fifth Circuit opinion in this case has created an interesting dichotomy within their own case law. In *United States v. Coleman*, 997 F.2d 1101 (5th Cir. 1993), *cert. denied*, 510 U.S. 1077, 114 S. Ct. 893, 127 L. Ed. 2d 86 (1994), the Court held that a District Court cannot order a defendant to pay restitution to a defrauded government entity when that entity had previously entered into a civil settlement and release with the defendant. In the case at bar, the Fifth

Circuit drew a distinction between the situation in *Coleman* and a case where there is a settlement between a defendant and a non-governmental victim. However, Petitioners assert that the reasoning behind precluding a restitution order when the settling victim is a government agency applies equally when the victim is not a government agency. In both cases, the civil settlement indicates that the victim has been satisfied as to any losses they have suffered and it is inappropriate to award them additional recovery through restitution.

The *Coleman* holding has been specifically addressed and rejected by the First Circuit in *United States v. Parsons*, *supra*. In *Parsons*, the court held that a civil settlement did not preclude a restitution order. Apparently, the First Circuit's position is that a settlement with any party does not preclude restitution.

A review of the case law in this area reveals at least three different potential interpretations. First, the *Bruchey* rationale from the Fourth Circuit that a civil settlement precludes criminal restitution in all cases. Second, the Fifth Circuit rule based on *Sheinbaum* and *Coleman*, that a civil settlement does not preclude criminal restitution unless the civil settlement is entered into with a government agency as the alleged victim. Third, the *Parsons* rule from the First Circuit that a civil settlement does not preclude criminal restitution regardless of whether the settlement is entered into with a government agency or private party. *See also United States v. Vetter*, 895 F.2d 456 (8th Cir. 1990) (following *Cloud* and upholding restitution order). Based on this variance in approach among the circuit courts, the granting of this petition is appropriate. The outcome of a case involving a civil settlement between a victim and defendant will vary greatly depending in which circuit the case arises. The differences

between the circuits on this issue are well developed and irreconcilable. For this reason, the Supreme Court should accept this petition and resolve this issue.

Question II

Has the Fifth Circuit Court of Appeals improperly extended the holding of *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986) by concluding that *Kelly* allows District Courts to impose restitution orders notwithstanding civil settlements.

Reasons for Granting the Writ

In *Kelly v. Robinson*, the court held that restitution obligations imposed as a condition of probation in a state criminal proceeding are not dischargeable in bankruptcy. In the case at bar, the Fifth Circuit, like the Ninth Circuit in *Cloud*, has extended the *Kelly* holding to conclude that it allows a District Court to order restitution in a criminal case despite the fact that the defendant and victim have entered into a civil settlement. This petition should be granted to determine whether the Courts of Appeals have improperly extended the *Kelly* holding into an area where it was not intended to apply. Under Rule 10(c), Supreme Court Rules, this is an important question of federal law that has not been, but should be, settled by the Supreme Court.

In extending *Kelly* to the fact situation in the case at bar, the Fifth Circuit Court of Appeals relied upon the following passage from *Kelly*:

> The criminal justice system is not operated primarily for the benefit of victims, but for the

> benefit of society as a whole. Thus, it is concerned not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment 'for the benefit of' the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to award restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino*: Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose.

Assuming, without conceding, that the rationale of *Kelly* applies to federal restitution orders, nevertheless, the question of whether a civil settlement precludes criminal restitution is so dissimilar to the question presented in *Kelly* that the application of *Kelly* to the case at bar is improper. The question presented here, as well as in *Cloud*, *Bruchey*, and *Parsons* is one of a voluntarily executed settlement agreement. In *Kelly*, the question was simply one of dischargeability of a state restitution order in bankruptcy where the victim opposed the discharge.

Moreover, the characterization of restitution as compensatory or punitive does not resolve the question of whether a voluntarily executed release and settlement

agreement precludes criminal restitution. Even if restitution is a penal provision, it is still improper to award a victim restitution when he has agreed he is no longer entitled to it. The Victim and Witness Protection Act may have penal purposes behind it, but it is incorrect to characterize it as a purely penal provision. In fact, as shown below, it is, in many respects, compensatory and for the benefit of the victim.

18 U.S.C. §§ 3663 and 3664, on their face, refer to the loss sustained by the victim as a result of the offense as establishing the amount of the restitution owed. (18 U.S.C. § 3663(B)(i)(I)). The statute further ties the restitution into the victim's losses by defining the manner of determining the victim's losses or manner of compensation. (18 U.S.C. § 3663(b)). The statute requires the probation officer to make an accounting of the victim's losses and the court to make a final determination of these losses. (18 U.S.C. §§ 3664(a) and (d)). The statute requires an order based on the victim's losses. (18 U.S.C. § 3664(f)). Additionally, no victim may be required to participate in any phase of a restitution order. (18 U.S.C. § 3664(g)). Also, the amount of restitution paid is to be reduced based on payments by insurance companies or any payment received by the victim through a civil proceeding. (18 U.S.C. § 3664(j)). The victim is also allowed to enforce the restitution order as a civil judgment. (18 U.S.C. § 3664(m)(ii)(B)). All of these provisions point to a compensatory motivation behind these statutes.

In fact, *Kelly*, in no way, has resolved the question of the nature of restitution as it affects the specific issue in the case at bar. Even if restitution in general is a penal provision, the statutes at issue here do not preclude consideration of the victim's actions, recoveries or agreements in fashioning a restitution order. In fact, these statutes clearly contemplate consideration of those factors.

Moreover, *Kelly* did not decide that the Victim and Witness Protection Act was a penal rather than a compensatory statute. There is certainly significant reason to interpret this statute as primarily compensatory. *See* Bonnie Arnett Von Roeder, Note, "*The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*", 63 Tex. L. Rev. 671 (1984) (describing scholarly debate over the nature of restitution). The language of the statute and its operation in the courts clearly supports a conclusion that the statute is, at least in significant parts, compensatory. Even the Fifth Circuit in the case at bar recognized that the answer to this question is far from clear.

In the case at bar, the Fifth Circuit stated, "The resolution of this question turns on our characterization of the nature of restitution under the VWPA." If this is correct, then this petition should be granted to determine the nature of restitution for purposes of the question of whether a civil settlement precludes a criminal restitution order. (*See Kelly*, 107 S. Ct. at 363, dissent by Justice Marshall, joined by Justice Stevens, stating, "While restitution imposed as a condition of probation under the Connecticut Statute is in part a penal sanction, it is also intended to compensate victims for their injuries.") The Fifth Circuit erroneously concluded that *Kelly* had dictated the result reached on this question. In fact, the question presented here has never been resolved by the Supreme Court.

Based on the improper extension of *Kelly* into an area not addressed by the Court in that case, this petition should be granted. The question of whether *Kelly* commands a conclusion that a civil settlement does not preclude a criminal restitution order should be settled by the Supreme Court.

Question III

Does allowing the award of restitution notwithstanding a civil settlement constitute impermissible double recovery by a victim of an offense.

Reasons for Granting the Writ

In its opinion, in the case at bar, the Fifth Circuit stated:

> Of course, to avoid double counting, a district court must reduce the size of its restitution order by any amount received by the victim as part of a civil settlement. See 18 U.S.C. §3664(j)(2).

The Court of Appeals then discussed the manner in which the value of a civil settlement is to be determined in this context. In discussing the procedure for making this determination, the Court of Appeals decided an important question of federal law that has not been, but should be, settled by the Supreme Court. *See* Rule 10(c), Supreme Court Rules.

In rejecting Petitioner's argument, the Court of Appeals made the following rulings:

1. District Courts possess discretion to impose restitution orders in spite of civil settlements.

2. To avoid double counting, a District Court must reduce the size of its restitution order by any amount received by the victim as part of a civil settlement.

3. It is the defendant's burden to proffer evidence to the court as to the value of the consideration they gave to the victim in exchange for the release.

The important question raised here is how the value of the civil settlement is to be determined in order to avoid double recovery by the victim. The Court of Appeals agreed that the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-64, does not allow a double recovery by the victim. Therefore, when the victim has entered into a settlement agreement with the defendant, an important question arises as to how the value of that settlement agreement is to be determined.

Even if the settlement agreement and release do not completely preclude a restitution order, they nevertheless are to be considered in determining the amount of restitution to be assessed. In *United States v. Hairston*, 888 F.2d 1349, 1355 (11th Cir. 1989), the court relied upon *United States v. Rico Industries, Inc.*, 854 F.2d 710, 715 (5th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S. Ct. 1529, 103 L. Ed. 2d 834 (1989), and stated:

> However, if the civil action was based on the same acts of the defendant that are the predicate of the criminal conviction, then any settlement between the defendant and the victim in the civil case should be one of the factors considered by the trial court in forming the restitution order.

The appropriate way to factor in the civil settlement as part of the analysis on the restitution order is to presume that the value of the settlement and release is equal to the value of the claims being released. This presumption is based on simple common sense. However, the Court of Appeals in the case at bar has engaged in the opposite presumption. According to the Court of Appeals, the courts are to presume that there is no value in a settlement and release unless the defendant provides evidence of the value separate from the release and settlement

agreement. The Court of Appeals has turned logic on its head and placed the burden of proof and persuasion on this issue completely opposite from where it should be. Effectively, the Court of Appeals has allowed the civil settlement to play no role in assessing the restitution.

The Supreme Court should review this opinion of the Court of Appeals to correct this improper placement of the burden of proof. The correct rule of law for both this case, as well as the many other cases where this issue arises, is that a civil settlement and release is prima facie evidence that the parties have settled all claims between them and there is no restitution owed to the victim. If the government has evidence to refute this, it should be their burden to produce it. At the very least, the District Court should be required to consider the civil settlement in assessing the restitution as the *Hairston* court stated.

In this case, the Court of Appeals concluded that the Petitioners waived their claim that the civil settlement and release had value that should be offset against the restitution. In fact, the Petitioners presented an adequate record to show the value of the settlement and the government waived any argument that the settlement and release were less than the value of the claim by not presenting evidence demonstrating this. Indeed, in this case there was more than adequate proof that the parties to the settlement considered the consideration given by the Petitioners to be worth the amount of the rentals paid to the Petitioners. At a minimum, the Supreme Court should give guidance to the bar and District Courts as to how the value of a release and settlement is to be determined.

The question of valuation of a civil settlement, and the proper method to insure that the victim does not receive a double recovery is an important question that appears frequently in the

District Courts. This petition should be granted in order to clarify the method for making this determination under the Victim and Witness Protection Act.

CONCLUSION

This petition raises important questions of interpretation of the federal restitution statute and it's application in the face of a civil settlement between the defendants and the victim. This is a frequently recurring question in the Courts below and the Circuit Courts have come to different conclusions as to the appropriate answer. The issue raised is ripe for decision by the Supreme Court and therefore, the Petitioners pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED FEBRUARY 27, 1998

UNITED STATES of America,
Plaintiff-Appellee,

v.

Uri SHEINBAUM, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Marc A. BIRNBAUM, Defendant-Appellant.

Nos. 97-41055, 97-41152.

United States Court of Appeals,
Fifth Circuit.

Feb. 27, 1998.

* * *

Before GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Defendants Uri Sheinbaum and Marc Birnbaum each pled guilty to one count of conspiracy to defraud the government

and to commit bankruptcy fraud. They now appeal both the sentence and the restitution order that the district court imposed upon them. We affirm.

I.

Birnbaum and Sheinbaum were principals in various entities that were partners in a limited partnership known as 5555 Apartments, Ltd. In 1984, the partnership obtained a $10.2 million loan from Alice Savings & Loan Association to purchase an apartment complex in Dallas, Texas, called the 5555 Apartments. The terms of the Promissory Note negotiated between the parties provided for a deferred downpayment of $1.7 million, with the first installment of $237,500 due in October 1985 and the remaining principal and accrued interest due in October 1994. Birnbaum and Sheinbaum were not personally liable under the Note. Securing the Note instead were a deed of trust, a security agreement, and an assignment of rents. The security language in the Note read as follows:

> THIS DEED OF TRUST, SECURITY AGREEMENT AND ASSIGNMENT OF RENTS is made . . . FOR THE PURPOSE of securing payment of the indebtedness. . . .
>
> TO SECURE the full and timely payment of the indebtedness . . . Grantor has ASSIGNED . . . (f) all revenues, income, rents, issues and profits of any of the Land, Improvements, personal property or Leases (collectively, the "Rents"). . . .

Appendix A

V. *Assignment of Rents:* Grantor does hereby absolutely and unconditionally assign, transfer and convey to Beneficiary, as well as to Trustee on Beneficiary's behalf, all Rents under the following provisions:

1. Grantor reserves the right, unless and until an Event of Default occurs under this Deed of Trust, to collect such rents as a trustee for the benefit of Beneficiary, and Grantor shall apply the Rents so collected in the order set forth in paragraph 7 of Section III hereof.

2. Upon an Event of Default, Beneficiary, or Trustee on Beneficiary's behalf, may at any time and without notice, either in person, by agent or by receiver to be appointed by a court, enter and take possession of the Property or any part thereof and in its own name sue for or otherwise collect the Rents.

The partnership made the first $237,500 installment on the deferred downpayment in November 1985.

In October 1987, the parties to the Note renegotiated its terms and executed a written Modification Agreement. The Agreement provided that all rents and income from the apartment complex were to be placed into a separate account to be used to pay off expenses and indebtedness. It stated:

> Grantor shall maintain a special account . . . into which all income derived from all sources in connection with the operation of the Property . . . shall be deposited by Grantor, and against which checks shall be drawn only for the payment of the sums becoming due and payable under the terms of the Note or this Deed of Trust and for the payment of the necessary and reasonable expenses incurred by Grantor in connection with the operation of the Property, with such latter payments being made directly to the persons or entities providing the goods or services for which such expenses are incurred.

By 1994, the ownership of the Note had passed to Banker's Trust Company of California. In September 1994, Birnbaum and Sheinbaum decided to default on their debt payments while retaining the income from the apartments for themselves. By withholding the apartments' income, they hoped to force Banker's Trust to renegotiate the terms of the Note. To aid them in this scheme, the defendants obtained the assistance of Gail Cooper, a financial consultant who had also helped the defendants to renegotiate the Note in 1987.

On January 30, 1995, Banker's Trust sued Sheinbaum and Birnbaum in Texas state court, seeking an accounting of all rents collected since default. On February 27, 1995, before an accounting could be completed, Birnbaum filed a petition in Bankruptcy Court for the Northern District of Texas, seeking relief for 5555 Apartments, Ltd. under Chapter 11.

As part of the bankruptcy proceedings, Birnbaum and Sheinbaum were required to disclose all payments made to

"insiders" of 5555 Apartments, Ltd. in the year preceding the bankruptcy filing. On March 22, 1995, the defendants filed a Statement of Financial Affairs in the bankruptcy court. The Statement revealed that $498,995 had been paid to insiders in the year prior to the bankruptcy petition, $134,000 of which had gone to Birnbaum and Lawrence Lambert, a business partner. The Statement asserted that the other $364,995 had been paid to an entity controlled by Sheinbaum as repayment for a debt owed to him by 5555 Apartments, Ltd. The Statement claimed that this debt had arisen from Sheinbaum's personal contribution towards the November 1985 payment of the first $237,500 installment on the Note. In fact, Sheinbaum's debt had long since been repaid. Sheinbaum and Birnbaum later repeated this false statement in an Amended Statement of Financial Affairs, under oath at a creditors' meeting, and in a deposition.

On June 21, 1996, the government charged Sheinbaum, Birnbaum, Cooper, and Lambert in a four-count indictment. In February 1997, Sheinbaum and Birnbaum pled guilty to count one of the indictment, charging them with conspiracy to defraud the government and to commit bankruptcy fraud. The district court sentenced them on August 25, 1997.

At sentencing, the government contended that Sheinbaum and Birnbaum's scheme had caused a loss of $498,995. In support of this position, it produced an affidavit from Victoria Tutterrow, who had worked on the 5555 Apartments, Ltd. bankruptcy as a representative for the United States Trustee's Office for the United States Bankruptcy Court for the Northern District of Texas. Tutterrow testified that the defendants deceived her into believing that the payments

made to them out of the apartments' income within the year preceding bankruptcy were for legitimate pre-existing business debts. Tutterrow stated that had she known that those debts had already been repaid, she would have sought the appointment of an independent trustee, who would have sued to recover the apartment's income appropriated by the defendants.

The defendants, on the other hand, disputed the government's loss calculations. Relying on the testimony of John Flowers, a former United States Bankruptcy judge, Birnbaum and Sheinbaum argued that they were legally entitled to take the income from the apartment complex. Furthermore, Phillip Palmer, a bankruptcy attorney, concluded in an affidavit that the false statements by the defendants could not have affected Tutterrow's decision to appoint an independent trustee and thus did not contribute to any loss, an opinion shared by Flowers. Finally, the defendants contended that they should owe little or no restitution, partly because they caused no loss and partly because they had reached a civil settlement with the victim prior to sentencing.

The district court sided with the government on all these issues and fixed the loss from the defendants' scheme at $498,995. Under U.S.S.G. § 2F1.1(b)(1)(J), a loss of between $300,000 and $500,000 mandates a nine-level increase in the offense level for a fraud. After adding these nine levels and then subtracting three levels for acceptance of responsibility, the district court arrived at a total offense level of fourteen, yielding a sentence range of fifteen to twenty-one months of incarceration. However, because the defendants provided the

government with substantial assistance in prosecuting others, the district court granted the government's motion for a downward departure, settling on a sentence of seven months for each defendant. In addition, it fined Birnbaum $20,000 and ordered both defendants to pay $498,995 in restitution to their victim, Banker's Trust.

II.

The defendants' first argument on appeal is that the district court erred in determining the amount of loss for sentencing purposes. They contend that they in fact caused no loss, as they were legally entitled to keep the income from the apartment complex for themselves and their actions in no way altered the course of the bankruptcy proceedings.

The defendants advance a complicated state-law argument, the premise of which is that the Note and the Modification Agreement entitled them to control of the income from the apartments. They entice the government into engaging them on this front. Yet whether or not the Note and the Modification Agreement created a "pledge" or an "absolute assignment" of rents is irrelevant in determining the amount of loss caused by the defendants' scheme. *See generally Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex.1981) (discussing Texas law on assignment-of-rent clauses).

Under the Bankruptcy Code, the bankruptcy trustee could avoid any transfer from the bankrupt estate made to insiders within the year preceding the filing of the bankruptcy petition. *See* 11 U.S.C. § 547(b)(4)(B). At sentencing, the defendants admitted that as insiders they received $498,995 from the

apartments in that one-year period. Under the Code, the only relevant defense available to Birnbaum and Sheinbaum was that these monies were received "in the ordinary course of business." *See* 11 U.S.C. § 547(c)(2).

The defendants' fraud operated by deceiving Tutterrow into believing that they had received the income in the ordinary course of business. Sheinbaum and Birnbaum lied to the bankruptcy court, informing it that $364,995 of the monies transferred to them were in satisfaction of a legitimate business debt. In fact, that debt had long since been repaid. As Tutterrow testified, had she known that there was no legitimate business justification for receiving that sum, she would have sought the appointment of an independent trustee, who could have sued to recover the entire $498,995 paid to insiders. Instead, she permitted the defendants to retain trustee powers as debtors-in-possession, thereby allowing them to abscond with the money. Thus, the defendants' fraud on the bankruptcy court directly led to a loss of $498,995.

The defendants attempt to argue that Texas state law entitled them to receipt of the income from the apartments, despite the Modification Agreement. This fact is simply irrelevant, however. As the defendants freely admitted in their factual resumes accompanying their guilty pleas, they knowingly withheld the apartments' income from the noteholder in an attempt to force the noteholder to renegotiate the terms of the loan. By no stretch of the imagination, therefore, can the payments to the defendants be considered to have been made "in the ordinary course of business." Thus, whether or not the defendants had the right under state law to receive the income initially, under the Bankruptcy Code

they could be forced to disgorge those monies unless they were entitled to the ordinary-course-of-business defense. Their fraud deceived Tutterrow into believing that they were so entitled. As Tutterrow stated in her affidavit, had she had any indication that the defendants were attempting to defraud the noteholder, she immediately would have sought the appointment of an independent trustee. Moreover, the defendants further conceded that they knew that under the Modification Agreement the income from the apartment complex could not be paid to them directly before the expenses and indebtedness on the apartments were satisfied. Defendants move too quickly when they admit as much during their plea, but then argue to us on appeal that somehow they were entitled to retain the apartments' income for themselves.

The defendants attempt to escape from the consequences of their crime by arguing that their actions caused no loss, as Tutterrow had sufficient independent authority to avoid the transfers to them, regardless of their status as ordinary-course-of-business payments. They suggest that Tutterrow could always have employed the fraudulent conveyance provisions of 11 U.S.C. § 548(b) to avoid the transfers to the defendants. Thus, they contend, their false statements were of no consequence, because they did not foreclose all of Tutterrow's options. Yet Tutterrow in her affidavit never expressed a willingness to exercise her § 548(b) powers, perhaps because the defendants' deceptions led her to believe that they would be entitled to a good faith defense under 11 U.S.C. § 548(c). Regardless, as Tutterrow stated, an indication of fraud is what would have led her to seek the appointment of an independent trustee to avoid any preferential transfers. Because the defendants masked their fraud through their false statements,

their crime altered Tutterrow's actions and directly caused the loss to the noteholder.

Finally, Sheinbaum and Birnbaum contend that even if they lied when they claimed they took the apartments' income to satisfy an unpaid loan, their falsehood caused no loss because 5555 Apartments, Ltd. also owed Sheinbaum $500,000 on a separate debt, which was never satisfied. Yet as the government points out, this $500,000 debt arose out of a judgment in favor of an investment banking firm, F.M. Roberts, which Sheinbaum and Birnbaum had employed to try to find investors to buy their ownership interests in 5555 Apartments, Ltd. Tutterrow believed that these syndication expenses were incurred for the personal financial benefit of the defendants, and thus did not arise "in the ordinary course of business." *See* 11 U.S.C. § 547(c)(2). According to Tutterrow's affidavit, had she been told that the defendants had taken income from the apartments to pay off this particular $500,000 obligation, she would have sought the appointment of an independent trustee.

We conclude that the district court erred neither in determining that Birnbaum and Sheinbaum caused a loss to the noteholder nor in calculating the magnitude of that loss. Accordingly, in sentencing the defendants, the court used the proper total offense level as a basis for its downward departure.

III.

The defendants also challenge the $498,995 of restitution ordered by the district court, repeating the arguments we reject

above that they never caused any losses. In addition, the defendants contend that they should not owe any restitution to the victim, Banker's Trust, because prior to their convictions they entered into a civil settlement with Banker's Trust. Pursuant to the settlement, Banker's Trust agreed to release Sheinbaum and Birnbaum from all civil liability. Because Banker's Trust has already been recompensed, argue the defendants, they should not also be required to pay restitution pursuant to the Victim and Witness Protection Act, 18 U.S.C. §§ 3663-64 (Supp.1997).

In support of their position, the defendants rely upon *United States v. Coleman,* 997 F.2d 1101 (5th Cir.1993), *cert. denied,* 510 U.S. 1077, 114 S.Ct. 893, 127 L.Ed.2d 86 (1994). In *Coleman,* we held that a district court cannot order a defendant to pay restitution to a defrauded government entity when that entity had previously entered into a civil settlement and release with the defendant. The *Coleman* court, however, expressly declined to reach "the question of the effect of a full release in a civil suit not involving the government on a subsequent criminal prosecution." *Id.* at 1107 n. 4. The defendants urge us to extend the *Coleman* rule to cover all civil settlements and releases. *See also United States v. Bruchey,* 810 F.2d 456, 460 (4th Cir.1987) (implying that a voluntarily executed agreement between a defendant and his victim would render a restitution order unnecessary). *But see United States v. Cloud,* 872 F.2d 846, 853-54 (9th Cir.) (rejecting the *Bruchey* holding), *cert. denied,* 493 U.S. 1002, 110 S.Ct. 561, 107 L.Ed.2d 556 (1989).

The resolution of this question turns on our characterization of the nature of restitution under the VWPA.

If restitution is purely a penal device, then a civil release from liability should have no effect on a restitution order, as a court must consider public, not private, interests in fixing its sentence. If, on the other hand, restitution is inherently a compensatory measure, then civil settlements should prohibit restitution awards, as the victim would already have been compensated to its satisfaction. *See* Bonnie Arnett Von Roeder, Note, "The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982," 63 Tex. L.Rev. 671, 677-79 (1984) (describing scholarly debate over the nature of restitution).

There are strong arguments to be made that the goal of the VWPA is compensatory. *See id.* at 679-84 (analyzing text and legislative history of VWPA and concluding that it was intended primarily to be a compensatory, rather than punitive, statute). Indeed, the very title of the VWPA — "The Victim and Witness Protection Act" — might lead one to believe that the point behind the VWPA is compensation, not retribution or the like. Nevertheless, the overwhelming trend in the caselaw is to read the VWPA as a penal provision. The catalyst for this trend was the Supreme Court's decision in *Kelly v. Robinson*, 479 U.S. 36, 55, 107 S.Ct. 353, 364, 93 L.Ed.2d 216 (1986). In *Kelly*, the Court was asked to consider the nature of restitution ordered under a Connecticut statute. In concluding that the Connecticut restitution statute was penal in character, the Court commented broadly about the purpose of restitution in the criminal law:

> The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. Thus, it is concerned

> not only with punishing the offender, but also with rehabilitating him. Although restitution does resemble a judgment "for the benefit of" the victim, the context in which it is imposed undermines that conclusion. The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant. As the Bankruptcy Judge who decided this case noted in *Pellegrino:* "Unlike an obligation which arises out of a contractual, statutory or common law duty, here the obligation is rooted in the traditional responsibility of a state to protect its citizens by enforcing its criminal statutes and to rehabilitate an offender by imposing a criminal sanction intended for that purpose."

Id. at 52, 107 S.Ct. at 362 (citations omitted).

Technically, the Court's comments in *Kelly* were aimed only at a state restitutionary system, yet in a footnote the Court hinted that they might apply to the VWPA as well. *See id.* at 53 n. 14, 107 S.Ct. at 363 n. 14; *see also United States v. Caddell,* 830 F.2d 36, 39 (5th Cir.1987) (concluding *Kelly* generally applies to both state and federal restitution orders). Nearly every circuit that has later confronted the question has taken *Kelly* to mean that the VWPA is penal, not compensatory, in nature. *See United States v. Savoie,* 985 F.2d 612, 619 (1st Cir.1993); *United States v. Vetter,* 895 F.2d 456, 459 (8th Cir.1990); *United States v. Hairston,* 888

F.2d 1349, 1355 (11th Cir.1989); *Cloud,* 872 F.2d at 854. *But see Bruchey,* 810 F.2d at 460-61 (confusingly concluding that VWPA is fundamentally penal in nature but that nevertheless a civil settlement can absolve a defendant of the need to pay restitution). Our Circuit, without citing *Kelly,* has held that the effect of a civil settlement on a criminal restitution order "depends upon what payment was made in the settlement, whether the claims settled involved the same acts of the defendants as those that are predicated on their criminal convictions, and whether the payment *satisfies the penal purposes* the district court sought to impose." *United States v. Rico Indus.,* 854 F.2d 710, 715 (5th Cir.) (emphasis added), *cert. denied,* 489 U.S. 1078, 109 S.Ct. 1529, 103 L.Ed.2d 834 (1989).

Rico Indus. and *Kelly* lead us to conclude that district courts possess the discretion to impose restitution orders in spite of civil settlements. That the victim has agreed in a civil proceeding that it has been compensated fully does not prevent a district court from pursuing the rehabilitative and retributive functions of the criminal law served by restitution. *Cf. Coleman,* 997 F.2d at 1107 (recognizing that " 'the law will not tolerate privately negotiated end runs around the criminal justice system' in the use of the VWPA") (quoting *Savoie,* 985 F.2d at 618). *Coleman* does not command a different result. In *Coleman,* a government agency (working in close connection with the U.S. Attorney's Office) negotiated a civil settlement with the defendant. We reasoned that in releasing the defendant from future civil liability, the government was essentially estopped from seeking further compensation in criminal litigation from the defendant. No such estoppel principle exists in this case, however, as the

government here sought a restitutionary order in favor of a third party, Banker's Trust. Indeed, the *Coleman* court stressed that its holding was not meant to apply to situations like the one before us. *See Coleman*, 997 F.2d at 1107 & n. 4. The defendants also argue that because the RTC was a named beneficiary of their civil settlement with Banker's Trust, the *Coleman* rule should apply. Yet as *Coleman* stressed, it was the fact that the government negotiated the settlement with the defendants that created an estoppel issue. Here, there is no record evidence indicating that the RTC played a substantial role in settling the civil matter.

IV.

Of course, to avoid double-counting, a district court must reduce the size of its restitution order by any amount received by the victim as part of a civil settlement. *See* 18 U.S.C. § 3664(j)(2) (Supp.1997); *Rico Indus.*, 854 F.2d at 715 ("If [the settlement] is based on the same acts, the object of restitution — to restore the party harmed — would indicate that [the defendant] be credited with the amount of the settlement."). Here, the victim and the defendants entered into a settlement, whereby Banker's Trust agreed to release Birnbaum and Sheinbaum from civil liability. Yet the record does not reveal what Banker's Trust obtained in return for this release; the release itself simply states that it was given for "good and valuable consideration." We doubt that Banker's Trust struck a bargain in which it was to receive nothing of value in exchange for its release. Yet the district court ignored the potential value of the release in fashioning its restitution order. Instead, the court required the defendants to pay to Banker's Trust the full $498,995 of loss caused by their crime.

The government, however, contends that the district court's failure to credit the defendants for the value of their civil settlement does not invalidate the restitution order, as it was the defendants' burden to proffer evidence to the court as to the value of the consideration they gave to the victim in exchange for the release. We agree.

The federal restitution statute provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

18 U.S.C. § 3664(e) (Supp.1997). It might appear to the casual observer that § 3664(e) places the burden of proof on the government on all issues relating to loss to the victim. Yet the burden section of the statute only requires the government to establish "the amount of loss sustained by [the] victim," *United States v. Razo-Leora*, 961 F.2d 1140, 1146 (5th Cir.1992); it does not speak to any compensation later received by the victim for that loss. Logically, the burden of proving an offset should lie with the defendant. The statute allocates the various burdens of proof among the parties who

are best able to satisfy those burdens and who have the strongest incentive to litigate the particular issues involved. Having investigated the crime and wishing to provide as strong a deterrent as possible, the government is best suited to persuade the court as to the amount of loss caused by the offense. On the other hand, the defendant is better positioned to proffer evidence about his own financial resources and needs, and his desire to lower his restitution order gives him the incentive to litigate such mitigating circumstances. In a similar vein, the defendant should know the value of any compensation he has already provided to the victim in civil proceedings, so the burden should fall on him to argue for a reduction in his restitution order by that amount. *Cf. United States v. Flanagan,* 80 F.3d 143, 146 (5th Cir.1996) ("[A]s a general rule, the party seeking the adjustment in the sentence is the party that has the burden of proving the facts to support the adjustment.").

Therefore, we conclude that "justice requires" that the burden of establishing any offset to a restitution order should fall on the defendant. *See* 18 U.S.C. § 3664(e) (Supp.1997) ("The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires."). Although we doubt that in releasing the defendants from civil liability Banker's Trust acted in the spirit of altruism, the defendants failed to present any evidence to the district court as to the value of the consideration they provided in exchange for the release. We will not simply assume that the monetary value of the consideration and the bundle of rights conferred upon the victim by the settlement equaled the monetary value of the loss sustained by the victim. If that were the case, then

§ 3664 would absolutely bar restitution whenever a civil settlement was reached between the defendant and the victim, rather than providing an offset for the value of the settlement. Accordingly, having failed to present valuation evidence to the district court, the defendants waived their offset claim. The district court was entitled to order both of them to pay as restitution to the victim the entire amount of loss caused by their scheme. *See United States v. Chaney*, 964 F.2d 437, 452-54 (5th Cir.1992) (upholding district court's authority to impose joint and several liability for restitution).

V.

We affirm both the sentence and the restitution order imposed by the district court.

AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS IN *UNITED STATES OF AMERICA v. URI SHEINBAUM* DATED AND FILED AUGUST 27, 1997

United States District Court
Eastern District of Texas

Case Number: 4:96CR00035-003

UNITED STATES OF AMERICA

v.

URI SHEINBAUM

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

* * *

RESTITUTION

* * *

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Appendix B

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered
AMRESCO Management, Inc.	$498,995.00	$498,995.00
	* * *	
Totals:	$498,995.00	$498,995.00

* * * *

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS IN *UNITED STATES OF AMERICA v. MARC A. BIRNBAUM* DATED AND FILED AUGUST 27, 1997

United States District Court
Eastern District of Texas

Case Number: 4:96CR00035-002

UNITED STATES OF AMERICA

v.

MARC A. BIRNBAUM

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

* * *

RESTITUTION

* * *

☒ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Appendix C

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered
AMRESCO Management, Inc.	$498,995.00	$498,995.00
	* * *	
Totals:	$498,995.00	$498,995.00

* * * *

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 22, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 97-41055 & 97-41152

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

URI SHEINBAUM

Defendant – Appellant

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

MARC A BIRNBAUM

Defendant – Appellant

Appeals from the United States District Court for the
Eastern District of Texas, Sherman

Appendix D

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 2/27/98, 5 Cir., __, __ F.3d __)

Before GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge

APPENDIX E — RELEVANT STATUTES

18 U.S.C. § 3663

§ 3663. Order of restitution

(a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)(i) The court, in determining whether to order restitution under this section, shall consider —

> **(I)** the amount of the loss sustained by each victim as a result of the offense; and
>
> **(II)** the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process

resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

(b) The order may require that such defendant —

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense —

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of —

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 —

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c)(1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), when sentencing a defendant convicted of an offense described in section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

(2)(A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense,

as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.

(B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine ordered for the offense charged in the case.

(3) Restitution under this subsection shall be distributed as follows:

> **(A)** 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.
>
> **(B)** 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.

(4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).

(5) Notwithstanding section 3612(c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.

(6) Requests for community restitution under this subsection may be considered in all plea agreements negotiated by the United States.

(7)(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

* * *

18 U.S.C. § 3664

§ 3664. Procedure for issuance and enforcement of order of restitution

(a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity

of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.

(b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.

(d)(1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.

(2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable —

(A) provide notice to all identified victims of —

(i) the offense or offenses of which the defendant was convicted;

(ii) the amounts subject to restitution submitted to the probation officer;

(iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;

(iv) the scheduled date, time, and place of the sentencing hearing;

(v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and

(vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and

(B) provide the victim with an affidavit form to submit pursuant to subparagraph (A)(vi).

(3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.

(4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony

heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.

(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.

(6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

Appendix E

(f)(1)(A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.

(B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.

(2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of —

> **(A)** the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;
>
> **(B)** projected earnings and other income of the defendant; and
>
> **(C)** any financial obligations of the defendant; including obligations to dependents.

(3)(A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.

(B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on

the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(4) An in-kind payment described in paragraph (3) may be in the form of —

(A) return of property;

(B) replacement of property; or

(C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.

(g)(1) No victim shall be required to participate in any phase of a restitution order.

(2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

(h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.

(i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.

(j)(1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.

(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in —

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of the State.

(k) A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the

defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

(*l*) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

(m)(1)(A)(i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or

(ii) by all other available and reasonable means.

(B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

(2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

(n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

(o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that —

(1) such a sentence can subsequently be —

(A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;

(B) appealed and modified under section 3742;

(C) amended under section 3664(d)(3); or

(D) adjusted under section 3664(k), 3572, or 3613A; or

(2) the defendant may be resentenced under section 3565 or 3614.

(p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any person against the United States or any officer or employee of the United States.

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